No. 11927

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG, and
UNITED STATES OF AMERICA,

Appellees.

Appellant's Closing Brief

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SEP 20 1948

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APPELLANT'S CLOSING BRIEF

I.

Defendant, Mary Boone Kendig, on pages 4 and 5 of her brief, raises the point that because plaintiff did not mention in her letter of March 1945 to the Bureau of Naval Personnel that she had had a conversation with her husband, Wiley SoRelle Kendig, in which he said he had changed the beneficiary of his insurance, that it is doubtful whether she had such a conversation with him regarding a change of beneficiary.

This doubt on the part of defendant is pure surmise and has no evidence to support it. We wish to point out that plaintiff sent an affidavit to the Veterans Administration in support of her claim to be benefic-

iary of the insurance of her husband, Wiley SoRelle Kendig, and in this affidavit she stated on oath that Wiley SoRelle Kendig had told her that she was his beneficiary, and his statement was made to her in the presence of a witness (T-88, 90, 91).

Defendant on page 5 of her brief also raises the point that George Kendig in his deposition was vague and uncertain and had an obvious desire to build up plaintiff's case. We can find no desire on the part of George Kendig other than the desire to tell the truth regarding the statements made to him by his brother, Wiley SoRelle Kendig, and he testified that he was not interested in any way in the outcome of the suit (T-72). Reading over his testimony, one is impressed by the fact that he is doing his best to remember and truthfully express statements made to him more than three years before. Any hostility he may have shown toward defendant's attorney was due, no doubt, to the irritating manner of questioning used by this attorney and his insinuations regarding George Kendig's truthfulness.

Defendant at page 21 of her brief is assuming one of the principal points of the present case where she says that Wiley SoRelle Kendig executed no form, applied for no change, and sent no letters requesting a change. On the contrary, there is testimony that Wiley SoRelle Kendig stated he had sent in a form to change beneficiary, and it is plaintiff's contention that this form was lost in the confusion of war. Wiley SoRelle Kendig wrote no letter to his wife showing his intention to make her his beneficiary for the reason that they were living together from the time of their marriage until his death, and there was no reason for him to write to her (T-37-42).

Since the case was decided on directed verdict, the evidence as presented should be taken in its strongest possible light for the plaintiff, even if there had been controverting testimony, and there was no evidence here to controvert the truthfulness of these witnesses.

II.

Defendant at pages 6, 18 and 19 of her brief raises the point that letters and statements made by the deceased insured are hearsay and inadmissable as proof of an act done to effectuate his intent to change beneficiaries.

It is plaintiff's view that the hearsay rule is not as strictly applied to cases involving government insurance as it may be applied in other types of cases, and also that the evidence in this case falls within the principles under which exceptions to the hearsay rule are admitted, these principles being necessity and circumstantial guaranty of trustworthiness.

Wigmore On Evidence
Vol. 5, par. 1420 et seq.

In the case of

Ambrose v. United States, et al.
D.C., W.D.N.Y., 1926
15 Fed. (2d) 52

where the issue involved beneficiaries of government insurance, the court held that letters and statements made by the deceased insured were admissible.

In the case of

United States v. Wescoat
Fourth Circuit, 1931
49 Fed. (2d) 193, 196

involving the admission of hearsay evidence in a gov-

ernment insurance case, the court admitted the evidence and said,

> "The hearsay rule is important, but courts should not hesitate to recognize exceptions to it where such exceptions fall within recognized principles and are necessary to the ascertainment of truth and the doing of justice."

The objection which defendant has raised would apply equally as well to many of the cases cited in both plaintiff's opening brief and in defendant's brief, yet there has been no hesitancy on the part of these courts to admit this evidence and to rely on it in reaching their decisions.

There are, no doubt, two main reasons for permitting evidence of this nature in cases involving deceased soldiers. First, there is the policy which has been stated by many courts in numerous decisions, that the expressed intentions of deceased soldier should be treated with great liberality so as to give effect to these intentions, even though all formalities have not been complied with; and second is the fact that evidence of this nature is frequently the only evidence available as to the deceased soldier's intentions, desires and purposes. There is, therefore, the necessity for the admission of such evidence, and there is great guarantee of the truthfulness of the evidence when testimony of witnesses is corroborated by other witnesses and also by a written declaration of the deceased soldier. Exclusion of such evidence on the ground it is hearsay, where it is the only evidence available and where there is strong guaranty of its truthfulness, would not be going very far in the direction of treating the soldier's intentions with liberality so as to give effect to these intentions.

In the present case the evidence is necessary, being the only evidence available, and there is ample corroboration as to his intention to change, and his belief that he had done so. There were two witnesses who testified that Wiley SoRelle Kendig had declared that he had sent in a form to change beneficiaries and his own written statement that his wife was his beneficiary. Truly, there can be no doubt that Wiley SoRelle Kendig wanted to change, intended to change, and believed that he had changed the beneficiary of his government insurance.

It is to be noted that in the case of

Bradley v. United States
Tenth Circuit, 1944
143 Fed. (2d) 573

on which defendant heavily relies, the court without commenting on the objection to the admission of testimony as to statements of deceased, allowed such evidence to be admitted.

The Bradley case, supra, cited with approval

Kingston v. Hines
D.C.W.D. Mich., 1926
13 Fed. (2d) 406

as commented on in defendant's brief at page 19, but this was on another point and was not on the point of admissibility of evidence.

It seems clear from an inspection of the cases that the courts have admitted evidence of the type offered in the present case and have accepted the validity of such evidence to show intent to change and the acts in furtherance of this intent where government insurance is involved.

III.

Defendant has in her brief made much of a purported distinction between the Form 41, entitled "Designation of Beneficiary," the Government Insurance Report Form, and the confidential statement required for men in the flying services. We believe that insofar as the evidentiary value is concerned relative to a change of beneficiary, there is no difference among these three forms. The Form 41, the insurance report form, and the confidential statement all name the person the soldier believes is the beneficiary. The Form 41 and insurance report form are sent to the War Department and the confidential statement is kept with the squadron files, but none of these forms is a writing addressed to the Veterans Administration requesting a change of beneficiary. All are merely forms which the government requires and on which is noted the person the soldier believes to be his beneficiary. All are strong evidence when in conjunction with statements by the soldier that he has sent in a form to change his beneficiary, that such a change has been made and that the soldier believes that the person named is his beneficiary.

On page 12 of defendant's brief, an attempt is made to distinguish the case of

Mitchell v. United States
Fifth Circuit, 1948
165 Fed. (2d) 758

on the grounds the District Court had stressed that a witness had seen the deceased soldier sign the insurance report form naming his wife as beneficiary. The fact that his signature was witnessed adds nothing to the case, for there has been no doubt at all raised in the present case that Wiley SoRelle Kendig did not

sign the confidential statement. The court in the Mitchell case, supra, with facts very similar to the present case said in very clear language that the statement by an officer in the Air Corps that he had changed his beneficiary is *strong and almost incontrovertible evidence of a change of beneficiary.*

Defendant on pages 16 and 17 of her brief in discussing the case of

Van Doren v. United States
D.C.S.D. Calif., 1946
68 Fed. Sup. 222

says that apparently the court was impressed by the fact that the wife's case was not contested by decedent's father and sister. This should make no difference, for the wife would still have to present a prima facie case that there had been a change and where such a case is presented the question should go to the jury even though the father and sister had appeared and contested the wife's claim.

On page 18 of her brief defendant cites the case of

Leahy v. United States
Ninth Circuit, 1926
15 Fed. (2d) 949

in which the deceased lived for two years after the date of a letter which was alleged to have been sent to the Veterans Administration requesting a change of beneficiary. In the present case, Wiley SoRelle Kendig was killed within two months or less of the time in which it is claimed he sent in a form to change beneficiaries, and in this short space of time, he would have had no reason to become suspicious at not hearing from the Veterans Administration acknowledging receipt of his form.

Plaintiff wishes also to point out that in the Leahy case, where there was testimony to the effect that deceased insured had said he intended to change beneficiaries and an unsigned copy of a letter to the Veterans Administration was found among his papers, the court held that the case was one for determination of the court on the preponderance of the evidence. Thus if there had been a jury, it would have been for determination of the jury, and not a directed verdict.

Defendant has relied most heavily on the case of Bradley v. United States, supra, discussed at pages 6, 7 and 8 of defendant's brief, particularly on the decision by a majority of the court that the confidential statement signed by deceased was not sufficient, along with his statements of intention to change, to cause a change of beneficiaries.

It is plaintiff's contention that the dissenting opinion of Judge Phillips in the Bradley case accords more nearly with the view taken by the courts in the later decisions regarding changes of beneficiaries of government insurance.

It is to be noted that several later cases have distinguished the Bradley case on the facts and have found that the beneficiary was changed in accordance with the deceased soldier's intentions.

In the case of

Shapiro v. United States
Second Circuit, 1948
166 Fed. (2d) 240, 242

the court clearly indicated that if it came to the place where it could not distinguish the Bradley case on the facts, then it would favor the view as taken in the dissenting opinion of Judge Phillips.

The court in

Roberts v. United States
Fourth Circuit, 1946
157 Fed. (2d) 906, 909

found that the affirmative act lacking in the Bradley case was performed, and it therefore would not be necessary to consider the view as presented by Judge Phillips in his dissent. The implication here is that this court would have seriously considered Judge Phillip's views.

Plaintiff earnestly submits to this court the view that there was sufficient evidence that Wiley SoRelle Kendig intended to change, did change, and believed that he had changed the beneficiary of his insurance from his wife, so that it was error for the trial court to direct a verdict for the defendant.

Respectfully submitted,

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